Supreme Court, U. S.
FILED
DEC 7 1977
MICHAEL RODAK, JR., CLERK

No. 77-821

In The Supreme Court of The United States

_____ Term, 1977

ALEXANDER BENJAMIN CHASES

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Barton C. Shee.
3104 Fourth Avenue
San Diego, California 92103

Counsel for Petitioner

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PETITION FOR WRIT OF CERTIORARI
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The petitioner, ALEXANDER B. CHASES, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case June 24, 1977.

OPINION BELOW

The opinion of the Court of Appeals of June 24, 1977, is not reported, but is set forth verbatim in Appendix "A" at pages 14 through 16.

JURISDICTION

On June 24, 1977, the Court of Appeals of the Ninth Circuit entered judgment affirming the criminal conviction of petitioner for conspiracy to import marijuana and possess marijuana with intent to distribute, in violation of 21 U.S.C. Sections 841, 846, 952, 960, and 963. The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254(1), and Rule 22(2) of the Rules of the Supreme Court.

QUESTION PRESENTED

Is a protective sweep search of a residence and its detached garage, executed to discern the presence of unknown, possible co-conspirators, justified solely on the basis that government agents believe conspiratorial activity to be in progress?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be

searched, and the persons or things to be seized.

STATEMENT OF THE CASE

In an indictment, the grand jury for the Southern District of California charged petitioner ALEXANDER B. CHASES and three others with conspiracy to import marijuana and to possess marijuana with intent to distribute in violation of 21 U.S.C. Sections 841, 846, 952, 960, and 963. Petitioner pled not guilty and moved to suppress evidence. The court denied that motion. Following a stipulated facts trial, the court imposed a sentence of five years. Petitioner appealed to the Ninth Circuit Court of Appeals and his conviction was affirmed in a memorandum opinion filed June 24, 1977.

The facts of the case are as follows:

On the morning of October 18, 1975, DEA special agents H. Curtis Burrell and Owen Miller drove to an area in the vicinity of Blythe, California. Burrell had been informed that certain individuals would pick up a quantity of "what purported to be marijuana" at an airstrip in Imperial County on October 19, 1975. Burrell had also been informed that an undercover agent, a Mr. Farnan, had been introduced into this group of individuals, and that Mr. Farnan would be piloting the airplane which was to deliver the purported "marijuana" to the airstrip [R.T. 5-6. All page references herein are to the reporter's transcript.].

Burrell and the other agents involved in this operation knew that the substance to be delivered would not be marijuana but alfalfa, packaged so as to simulate marijuana kilos [R.T. 5, 6, 33]. Burrell and Miller located an abandoned airstrip approximately twenty-five miles north of the town of Blythe [R.T. 6].

At 4:00 a.m. on the 19th of October, Burrell positioned himself on a hill to the east of the airstrip. At approximately 6:25 a.m., an airplance landed on the strip for about ten minutes [R.T. 7].

After the plane had departed, Burrell and Miller observed a station wagon and a motor home drive to the point where the airplane had stopped, and park there for a short time. Then both vehicles left the area, proceeding south [R.T. 7]. Burrell and Miller took up surveillance of the two vehicles, aided by a DEA cover plane and approximately six other DEA vehicles.

The station wagon and the motor home were under continuous surveillance until they reached their ultimate destination in San Diego at approximately noon on October 19 [R.T. 11]. The two vehicles proceeded south on Highway 163, then west on Friars Road and parked in the lot of the Levitz Furniture Store [R.T. 12].

At this point, the station wagon and the motor home were met by a third vehicle, a blue Volkswagen, containing a single occupant [R.T. 12]. The driver

of the station wagon left that vehicle and entered the Volkswagen [R.T. 23]. The mobile home then followed the Volkswagen to the residence of Randolph Perkey [R.T. 28] at 1911 Denver Street, San Diego [R.T. 12-13, 23].

When agents arrived in the vicinity of Perkey's residence, they observed the motor home backed into the driveway adjacent to the house, about "four paces" from a double-car garage located on Perkey's premises [R.T. 18, 23], but separated from, and standing somewhat south of, the residence [R.T. 19].

DEA Agent Richenberger drove his car southbound on Denver Street [R.T. 24], stopping for a period of about four or five seconds in front of the residence [R.T. 25]. From that position, Richenberger observed "three pairs of legs coming and going from the motor home" but was not able to observe if anyone entered the garage [R.T. 24, 42]. Richenberger advised other DEA agents as to what he had seen and the order was given for the agents to move in [R.T. 23]. The motor home left as the agents moved in and was off the premises at the time the agents entered the residence [R.T. 25]. The motor home was followed a short distance and then stopped by agents [R.T. 15, 26].

Agent Richenberger entered the grounds of the residence and went to the area at the rear yard [R.T. 25]. He was the only agent to go into the back yard area, the other agents entering the

front of the house [R.T. 46]. As Richenberger was approaching the gate going into the back yard, at a point between the back door of the house and the garage, Perkey came out through the back gate [R.T. 25, 34]. Richenberger was not able to tell whether Perkey had come from the house or from the garage [R.T. 35].

Richenberger informed Perkey that he was a federal agent and, in placing Perkey under arrest [R.T. 26], took him over to the garage and made him brace while leaning against the garage [R.T. 26, 31, 49]. Richenberger searched Perkey for weapons and then handcuffed him and took him into the house [R.T. 26, 47].

The arrest of Perkey took place at approximately 12:33 p.m. [R.T. 39]. Although two other individuals, CHASES and a Mr. Charles Chappell, had already been arrested in the house, several agents were still searching the house [R.T. 32, 53], and also the garage, allegedly to see if there was anyone else on the premises [R.T. 47, 53]. This search was conducted even though at the time the agents entered the premises only three individuals had been indicated as being present there [R.T. 48-49], and the agents had no reason to believe other suspects may have been present.

Perkey was taken into the house together with CHASES and Chappell and advised of his rights [R.T. 26]. CHASES

and Chappell were then taken to the DEA office for processing [R.T. 28]; however, Perkey was kept at the residence because the agents intended to contact the United States Magistrate for a search warrant [R.T. 28]. Several agents had already left for the United States Attorney's Office in an attempt to obtain a search warrant for the residence [R.T. 39, 43].

When Perkey asked how long it would take the agents to get a search warrant, Richenberger informed him that it would take several hours [R.T. 28, 41]. Richenberger said that the process could be speeded up if Perkey would consent to a search of the residence [R.T. 28, 43-44]. Perkey was aware at that time that DEA agents had been roaming in and about the house [R.T. 53]. Perkey gave his consent to a search of his residence, signing a written consent prepared by Richenberger, at 1:08 p.m. [R.T. 29]. This writing does not mention the garage [R.T. 30]. Perkey was never asked to consent to a search of the garage, and Richenberger knew that the garage had already been searched at the time the consent was obtained [R.T. 41, 43], and that the alfalfa had already been seized [R.T. 34].

In the course of their search of the house, the agents found marijuana, a Mexican sugar sack containing seven cellophane wrappers, two small glass vials containing a white powder, marijuana plants and seeds, a triple-beam scale, various documents and an address

book belonging to Perkey, and a handbag, later determined to belong to CHASES, containing a marijuana cigarette and an address book with phone numbers and addresses of other persons [R.T. 31, 33].

In the garage the agents discovered twenty-five or thirty "Mexican sugar sacks" containing alfalfa [R.T. 36]. No marijuana was found in the garage [R.T. 31-36].

REASON FOR GRANTING THE WRIT

To resolve the following claim of petitioner:

The search of a residence and detached garage exceeds the scope of a protective sweep search when government agents' sole justification for the search is their belief that conspiratorial activity is in progress.

> There is no principle more firmly rooted in our constitutional jurisprudence than that warrentless search is presumptively illegal. Only where the Government sustains a heavy burden of demonstrating that exigent circumstances rendered impossible the securing of a search warrant or conclusively proves that a knowing and voluntary consent to search was obtained may a warrantless search stand and

the evidence therein seized be used at the trial of its owner.

United States v. Gamble, 473 F.2d 1274, 1276 (7th Cir. 1973).

The importance of a search warrant to protect the privacy of one's residence has been emphasized in numerous cases. In McDonald v. United States, 335 U.S. 451, 456 (1948), this Court addressed itself to the issue of exceptions to the Fourth Amendment's warrant requirement and stated: "We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." (Emphasis added.)

In Terry v. Ohio, 392 U.S. 1, 20-21 (1967), this Court held that in order to justify a warrantless intrusion, the police officer must be able to point to "specific and articulable facts" warranting such an intrusion.

Dorman v. United States, 435 F.2d 385 (D.C.Cir. 1970), emphasized the heavy burden placed on police to show circumstances which avoid condemnation of a warrantless search as "unreasonable." Considerations specified by the Dorman decision are that (1) a grave offense is involved, particularly one that is a crime of violence; (2) the suspect is reasonably believed to be armed; (3)

probable cause exists to believe that the suspect committed the crime involved; and (4) there is strong reason to believe that the suspect is in the premises being entered.

In Vale v. Louisiana, 399 U.S. 30, 34 (1969), the Court reiterated that "only in a few specifically established and well-delineated situations . . . may a warrantless search of a dwelling withstand constitutional scrutiny. . . . The burden rests on the State to show the existence of such an exceptional situation." As set forth in Vale, those exceptional situations include (1) the officers' response to an emergency; (2) hot pursuit of a fleeing felon; and (3) the possibility that the goods ultimately seized are in the process of destruction or are about to be removed from the jurisdiction.

The testimony of the DEA agents in the instant case did not demonstrate the presence of any of the considerations mentioned in either Dorman or Vale. The only justification for the "protective sweep search" ultimately rests on the proposition that a conspiracy was believed to be in progress. The Court of Appeals, in upholding the search, stated: "[T]he possibility that other conspirators were present was real and far from insubstantial." (See, Appendix "A" at 16.) (Emphasis added.)

Is a mere "possibility" of the presence of other suspects sufficient justification for warrentless intrusion

into domains of privacy long accorded full Fourth Amendment protection? One can imagine a myriad of situations in which suspicion as to the possible presence of other suspects may arise. Under the appellate court's rationale, in such instances police would no longer be required to articulate particular "exigent circumstances" to justify their warrantless search of a residence. In any arrest involving a crime in which more than one individual might potentially be involved, a "protective sweep search" of the entire premises, including additional detached buildings, would become the standard operating procedure of the police.

During the course of the post-arrest search of Perkey's residence, and especially upon entering the garage, the DEA agents did not possess any reasonable basis from which to infer that anyone was hiding therein who might pose a threat to their safety, or that evidence was in the process of destruction. Compare United States v. Harris, 435 F.2d 74 (D.C.Cir. 1970) with United States v. Basurto, 497 F.2d 781 (9th Cir. 1974). The articulation of "exigent circumstances" which is a constitutionally mandated precondition to lawful execution of a non-consensual search of protected premises is simply not shown by the record and facts in this case.

There were no facts existent at the time the DEA agents entered Perkey's premises to indicate that individuals, other than Perkey, CHASES, and Chappell, were present in the house or the garage

[R.T. 48-49]. There are no facts in the record to indicate that the DEA agents believed Perkey, CHASES, or Chappell to be armed, and in fact, no weapons were found on the premises [R.T. 31-32].

The mere fact that DEA agents suspected Perkey, CHASES, and Chappell of involvement in conspiratorial activity should not justify the broad and intrusive search of the residence and of its detached garage which took place.

Petitioner contends that suspicion, belief, and even knowledge that a conspiracy is in operation is, alone, an insufficient "exigent circumstance" to authorize a warrantless and uncontrolled invasion into the privacy of areas fully protected by the Fourth Amendment. In view of the fact that the "protective sweep search" far exceeded any permissible scope, it is further argued that Perkey's later "consent" to search was a product of the DEA agents' illegal activity. The consent and the illegal search are inextricably joined. Wong Sun v. United States, 371 U.S. 471 (1963); Takahashi v. United States, 143 F.2d 118, 122 (9th Cir. 1944); United States v. Watson, 189 F.Supp. 776, 781 (S.D.Cal. 1960); Burrows v. Superior Court, 13 Cal.3d 238, 251 (1974).

Should this Court agree with petitioner that the initial "protective sweep search" was a violation of petitioner's Fourth Amendment rights, it is respectfully submitted that this case

should be remanded to the trial court so as to assess the voluntariness of Perkey's consent as affected by the government's conduct.

CONCLUSION

For the foregoing reasons, petitioner ALEXANDER B. CHASES respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Dated: November 30, 1977

Respectfully submitted,

Barton C. Sheela, Jr.

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- ALEXANDER B. CHASES, Defendant-Appellant.	)	No. 76-2981 MEMORANDUM

Appeal from the United States District Court for the Southern District of California

Before: CLARK, Justice,* and TRASK and WALLACE, Circuit Judges

Chases was convicted, after a court trial, of conspiracy to import marijuana and to possess marijuana with intent to distribute in violation of 21 U.S.C. §§ 841, 846, 952, 960, and 963. On appeal, he contends that certain evidence used against him should have been suppressed because seized in violation of the Fourth Amendment. We affirm.

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*Associate Justice Tom C. Clark, United States Supreme Court (Ret.), sitting by designation. Justice Clark concurred in the result after oral argument but did not vote on the disposition due to his untimely death.

The government challenges Chases' standing to raise the Fourth Amendment issue. Chases counters with the argument that he was legitimately on the searched premises and therefore has standing. See Brown v. United States, 411 U.S. 223 (1973). The government points out that, although Chases was indeed legitimately on the searched premises initially, he was not there "at the time of the contested search and seizure," id. at 229 (emphasis added), of the handbag. By that time government agents had taken him away. It appears from the record, however, that Chases was still present at the time of the initial protective sweep which took the agents into the garage where the dummy marijuana was stored. We hold, therefore, that Chases has standing to challenge the initial protective sweep or search. Because of our disposition on the merits, we will assume, without deciding, that Chases may also challenge the second, post-consent search that uncovered the handbag.

The initial sweep through the house and garage immediately following the arrest of Chases and his codefendants was legitimate. In our view, the agents were entitled to determine for self-protective purposes if other members of the conspiracy and any weapons were present. See Warden v. Hayden, 387 U.S. 294 (1967). Chases contends that it was clear to the agents that only Chases, Perkey and Chappell (who by then were under arrest) were present and that self-protection was a mere pretext for the

sweep. We reject this argument. It smacks too much of Monday morning quarterbacking. The agents were not omniscient and the possibility that other conspirators were present was real and far from insubstantial.

The district court's determination that Perkey's consent to the second search was knowing and voluntary in light of all the circumstances, see Schneckloth v. Bustamonte, 412 U.S. 218 (1973), is not clearly erroneous. United States v. Judge, 501 F.2d 1348 (9th Cir. 1974); United States v. Marshall, 488 F.2d 1169, 1186-89 (9th Cir. 1973). The district court had an opportunity to observe and evaluate the demeanor and testimony of participating agents as well as codefendant Perkey. Its findings are consistent with the record in all respects. Accordingly, we hold that the search and seizure of the handbag, and its introduction into evidence, were not violative of the Fourth Amendment or its exclusionary rule.

AFFIRMED.